Exhibit A

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SURGICAL INSTRUMENT SERVICE COMPANY, INC.,

Plaintiff,

v.

INTUITIVE SURGICAL, INC.,

Defendant.

Case No. 3:21-cv-03496-AMO

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S DEMONSTRATIVE EXHIBIT FOR OPENING STATEMENTS

The Honorable Araceli Martínez-Olguín

SIS's opening demonstratives make clear that SIS intends to present the jury with a misleading and incomplete account of disputed facts that Intuitive will not be able to correct without referencing evidence that SIS successfully moved to exclude from trial. Intuitive respectfully requests that the Court preclude SIS from using the demonstratives at issue and from referring to their disputed content in its opening statement. There are three overarching issues:

1. SIS falsely argues that Intuitive "killed" the businesses of Rebotix and Restore, while Intuitive is barred from introducing evidence showing those third parties remain in business and have had EndoWrist modifications approved under Intuitive's contracts (slides 12, 18, 26). SIS's demonstratives identify SIS, Restore, and Rebotix as "Independent Service Organizations" (ISOs) (slide 3), assert that Intuitive's contracts prohibited ISOs from servicing EndoWrists (slide 13), and then argue that Intuitive "killed the EndoWrist servicing market" (slide 18). The collective implication of these slides is that Intuitive blocked all third parties, including Restore and Rebotix, from servicing EndoWrists and "killed" their businesses. That is untrue. Intuitive's contracts allow approved third-party products and services. Intuitive publicly announced in March 2023 that hospital customers could purchase FDA-cleared remanufactured EndoWrists under the terms of their contracts with Intuitive. Restore (through its affiliate Iconocare) and Rebotix each have obtained FDA clearance to remanufacture EndoWrist instruments. Neither has been "killed" or blocked from providing third-party service for EndoWrists. But Intuitive will not be able to correct the false impression conveyed by SIS's slides because SIS successfully argued that the Court should exclude from trial "any evidence or argument about what happened after November 2022" (with limited exceptions not applicable here) as well as any FDA-related evidence. Dkt. 330 at 2-6 (FDA); Dkt. 330 at 8-9 (post-2022 evidence). SIS should not be permitted to mislead the jury in this manner without opening the door to evidence excluded under the Court's *in limine* rulings.

SIS also runs directly afoul of the Court's order regarding post-2022 evidence in slide 12 (referring to the alleged "market" and Intuitive's alleged "control" from 2023-2024), and

slide 26 (referring to undisclosed expert opinions concerning market definition, monopoly power and anticompetitive conduct without any limitation on the timeframe of those opinions).

2. SIS refers to hospital hearsay testimony that the Court has held to be unreliable and inadmissible (slides 15, 21, 28). In its MIL #1, Intuitive moved to exclude SIS's fact and expert witnesses from conveying to the jury the substance of statements by out-of-court hospital declarants purporting to show demand for modified EndoWrists by hospitals and lost sales or opportunities by SIS. Dkt. 289-1 at 1-2, 7. The Court granted Intuitive's motion. Dkt. 368. Intuitive cited as a specific example of inadmissible testimony Keith Johnson's statement describing hospital demand for modified EndoWrists as "monumental." Dkt. 289-1 at 2 (citing Johnson 30(b)(6) Tr. at 44:7-45:22 (Mot. Ex. 3)). SIS thereafter submitted an evidentiary proffer with a declaration from Johnson repeating his assertion that "interest from both current and potential new hospital customers was monumental," and making clear he was relying for that assertion exclusively on out-of-court discussions with hospitals. Dkt. 332-2 ¶¶ 10, 13. The Court held that "Johnson's testimony is itself hearsay for which SIS has not offered a modicum of reliability," and barred SIS from "present[ing] to the jury the supposed views of hospitals through out-of-court statements that will not be tested through cross-examination." Dkt. 368 at 2.

Given the Court's ruling, SIS should be precluded from presenting to the jury in opening two slides characterizing hospital demand for modified EndoWrists as "monumental" (slides 15, 21)—*i.e.*, the same testimony based on hospital hearsay that the Court has excluded. The Court should likewise preclude SIS from using its damages expert Mr. Bero as a mouthpiece for the same inadmissible hearsay statements of Johnson (and double-hearsay statements of Greg Posdal, who repeats what Johnson told him about hospital demand)—as SIS does in slide 28 (referencing "Documented Demand" and "great demand," based on Posdal and Johnson).

3. SIS makes arguments about the EndoWrist use limit and use counter that are misleading and unduly prejudicial if Intuitive cannot refer to the FDA's clearance of EndoWrists as limited-use devices (slides 8, 13, 18, 19, 23, 25). Use limits are part of the FDA-cleared labeling for EndoWrists. Intuitive is accordingly bound by federal law and regulations in

what it can do or say about the use limits and use counter. Intuitive, for example, could not lawfully market or promote its products to hospitals by telling them simply to ignore the FDA-cleared labeling for those devices. SIS's opening slides repeatedly make assertions regarding the EndoWrist use limits and use counter that will be misleading and unduly prejudicial if Intuitive cannot contextualize those assertions by reference to FDA clearances and labeling requirements. SIS should not be permitted to tell the jury that *Intuitive* requires hospitals to comply with the use limit while omitting any mention from trial of what the *FDA* requires. As it stands, Intuitive cannot complete the record and contextualize these statements for the jury, because SIS successfully moved to exclude FDA-related evidence in its motions *in limine* Nos. 1 & 5. Dkt. 330 at 2-6.

SIS's attempt to leverage the Court's ruling to further unfairly prejudice Intuitive is also reflected in slide 19, which shows an excerpt of a letter containing references to "Regulatory Clearances and Safety Precautions." The excerpt SIS proposes to use includes Intuitive's statement that "Intuitive's medical devices, including EndoWrist instruments, are evaluated by the United States Food and Drug Administration ('FDA')" and Intuitive's assertion that "[r]efurbishing activities performed by an unauthorized third party violate the U.S. Federal Food, Drug, and Cosmetic Act." Despite the Court's rulings, SIS has proposed no redactions to the underlying document, and proposes to feature one particular sentence in it (edited by SIS), call it a "threat letter," and not allow Intuitive to reference FDA-related content shown (in small print) on SIS's own slide. SIS is obviously using the Court's rulings as both shield and sword.

Separate from the objections noted above, Intuitive also objects to SIS's slides 10 and 13, which refer to prejudicial arguments about environmental waste that are legally and factually irrelevant to this antitrust trial: "while the environmental quality of energy sources may be a worthwhile concern, it does not appear to be a problem whose solution is found in the Sherman Act." *Schuylkill Energy Res., Inc.* v. *Penn. Power & Light Co.*, 113 F.3d 405, 414 n.9 (3d Cir. 1997) (rejecting environmental harms as basis for antitrust claims and collecting similar cases); *see also Gutierrez* v. *E. & J. Gallo Winery Co.*, 604 F.2d 645, 646 (9th Cir. 1979) (affirming dismissal of antitrust claims where alleged harms were unrelated to purpose of antitrust laws).

Dated: January 5, 2025

By: */s/ Kenneth A. Gallo*
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